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STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v Supreme Court No. 154565

LAVERE DOUGLAS-LEE BRYANT,

Defendant-Appellee.
_____/

Wayne Circuit Court No. 2013-009087-01-FC
Michigan Court of Appeals Docket No. 325569

DEFENDANT-APPELLEE'S SUPPLEMENTAL BRIEF IN RESPONSE TO PLAINTIFF-APPELLANTS APPLICATION FOR LEAVE TO APPEAL

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STATEMENT OF APPELLATE JURISDICTION

Appellee was convicted in the Wayne County Circuit Court by jury trial. A judgment of sentence was entered December 11, 2014. A claim of appeal was filed January 9, 2015 by the trial court pursuant to his request for appointment of appellate counsel, received January 2, 2015, as authorized by MCR 6.425(F)(3). The Michigan Court of Appeals had jurisdiction in this appeal of right pursuant to Mich Const 1963, art 1, §20; MCL 600.308(1), MCL 770.3, MCR 7.203(A), MCR 7.204(A)(2). This application is made within 56 days after the Court of Appeals decision. This Court has jurisdiction to consider this application for leave to appeal pursuant to MCR 7.301(A)(2).

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STATEMENT OF QUESTIONS PRESENTED

I

DID THE TRIAL COURT ABUSE IT'S DISCRETION IN ADMITTING "OTHER ACTS" EVIDENCE. UNDER MRE 404(B), WHERE THAT EVIDENCE DID NOT QUALIFY FOR ADMISSION UNDER THE RULE AS IT IMPERMISSIBLY WENT TO SHOW ONLY APPELLEE'S PROPENSITY TO ENGAGE IN SEXUAL ACTS, AND WAS MORE PREJUDICIAL THAN PROBATIVE.

Defendant-Appellee answers this question "Yes".
Plaintiff-Appellant answered this question "No".
The court below answered this question "No".
The Michigan Court of Appeals answered this question "No".

II

WHETHER THE TRIAL COURT'S ERROR IN ADMITTING "OTHER ACTS" EVIDENCE WAS HARMLESS.

Defendant-Appellee answers this question "No".
Plaintiff-Appellant answered this question "Yes".
The court below answered this question "Yes".
The Michigan Court of Appeals answered this question "Yes".

III

WHETHER THE TESTIMONY OF THREE POLICE OFFICERS INVADED THE PROVINCE OF THE JURY WHEN THEY TESTIFIED AS TO THEIR OBSERVATIONS IN VIEWING VIDEO EVIDENCE.

Defendant-Appellee answers this question "Yes".
Plaintiff-Appellant answered this question "No".
The court below answered this question "No".
The Michigan Court of Appeals answered this question "No".

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STATEMENT OF FACTS

Defendant-Appellee Lavere Douglas-Lee Bryant (hereinafter "Appellee") incorporates by reference his Statement of Facts from his October 24, 2016 reply to Plaintiff-Appellants Application for Leave to Appeal as though fully set forth herein.

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ARGUMENT I:

THE TRIAL COURT ABUSED IT'S DISCRETION IN ADMITTING "OTHER ACTS" EVIDENCE UNDER MRE 404(B), WHERE THAT EVIDENCE DID NOT QUALIFY FOR ADMISSION UNDER THE RULE AS IT IMPERMISSIBLY WENT TO SHOW ONLY APPELLEE'S PROPENSITY TO ENGAGE IN SEXUAL ACTS, AND WAS MORE PREJUDICIAL THAN PROBATIVE.

Appellee was charged in counts 1 through 4 with first degree premeditated murder [MCL 750.316(a)] and felony murder [MCL 750.316(b)] as to Joseph Orlando and Brenna Machus. Counts five through seven alleged armed robbery [MCL 750.529] as to Orlando or Machus, unlawful imprisonment [MCL 750.349b] as to Machus and felon in possession of a firearm [MCL 750.224f]. Count 8 alleged felony firearm [MCL 750.227b] during the commission of or attempt to commit counts 1through 7. Prior to the trial in this matter, the prosecution moved for permission to present evidence of "other acts" pursuant to MRE 404(b). See August 1, 2014 motion haring at pages 3-24.

At trial, the prosecution presented testimony from Paul Holt, a former co-worker at the Dearborn Family Dollar, (November 12, 2014 trial transcript at pages 98-100), who said Appellee was fired for sexual harassment and that Machus said he made her feel uncomfortable, (Id at 103-106); Family Dollar regional loss prevention manager Matthew Steingesser, who stated that Appellee was terminated for sexual harassment and inappropriate behavior, (Id at 125-127); Sarah Coulter, a friend of Machus who stated that Appellee was fired from the Inkster Family Dollar for sexual harassment, (November 14, 2014 trial transcript at pages 36-38); Nicole Ricks-Coleman, manager of the Dearborn Family Dollar, (November 17, 2014 trial transcripts at page 6), who stated that Appellee would always have issues with other female store employees, (Id at 7-10).; Ricks-Coleman's daughter Alexis Coleman, another Dearborn store employee, who said she felt Appellee inappropriately took a photo of her and made a comment about her breasts, (Id at 33-34); Garden City Family Dollar employee Amanda Priebe, (Id at 41-42), who said that Appellee inappropriately commented to her that she looked good in jeans, (Id at 44), and that she received complaints from female customers and store employees, (Id at 45); Assistant Detroit Family Dollar store manager Dionna Wilson, (November 17, 2014 trial transcript at page 56), who stated that in early 2012 (Id

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at 57), Appellee inappropriately commented to her that he liked the view from her back side, (T6 61-63); Aron Watkins, a co-worker with Appellee at various Family Dollar stores, who claimed to have observed Appellee act in a manner which made women uncomfortable, (Id at 76-79); Alyson Holt who worked at the Inkster Family Dollar in late 2012 and reported Appellee for standing near the bathroom as she was exiting, (Id at 83-86); April, 2013 Inkster Family Dollar employee Tannisha Fitzpatrick, (Id at 89-91), who reported Appellee because "he basically followed me around the store on several occasions" which made her feel uncomfortable, (Id at 91-92); Cristel Johnson, who stated that Appellee made inappropriate comments made her feel sexually harassed and uncomfortable, and that she witnessed similar behavior involving customers and other co-workers, (Id at 103-106); Family Dollar Field Specialist Cassidy Flaherty, who received three reports of Appellee harassing store employees, (Id at 115-123); and Inkster Family Dollar Store employee Jasmin Gregory, who said Appellee told her she was beautiful, asked to date her, touched her thigh, made inappropriate sexual comments to her and heard him say things to other store females, (Id at 128-132).

In addition, Michigan State Police Lieutenant Todd Johnson stated that Appellee had failed to register as a sex offender, (November 18, 2014 trial transcript at pages 100-120), and that in 2011 he met with Appellee at the Marquette Branch Prison to have him sign a sex offender registry responsibility form, (Id at 121-126); and Dearborn Police Corporal James Isaacs, who stated that he performed forensic examinations on approximately ten cell phones and a Mac Book. (November 19, 2014 trial transcript at pages 6, 17). On a phone containing what was believed to be Appellee's email, text messages, calendar and contact information, (Id at 27-28), he found internet history regarding pornographic websites that were viewed on the phone and two videos viewed April 15, 2012. In one entitled "Getting Even", several males enter an establishment, attack a female employee, steal money, remove her from the location, take her to a vehicle and have forcible sex with her. (Id at 24-25, 72). The phone was last used in April, 2013. (Id at 26).

Appellee contends that the trial court abused its discretion in admitting the other acts evidence under MRE 404(b). The prosecution failed to meet its burden to show the admissibility of

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the evidence by failing to show the probative force of the evidence was sufficient to support the alleged grounds for admission. The evidence only showed that Appellee had a propensity for engaging in sexually related acts under different circumstances. Despite the trial court's ruling and instructions to the contrary, the evidence may well have been used by the jurors to reflect on Appellee's character. Finally, the evidence, even if found to meet the foundational requirements for admission under the court rule, was significantly more prejudicial than probative. MRE 403.

The opinion of the Michigan Supreme Court in People v Crawford, 458 Mich 376; 582 NW 2d 785 (1998), is instructive to the case at bar. In Crawford, the accused was charged with possession with intent to deliver controlled substances after a quantity of drugs was discovered secreted in his car. The trial court, over a defense objection, permitted the prosecution to present evidence of the accused's prior commission of a drug sale, pursuant to the prosecution's argument under MRE 404(b) that this evidence went to prove the accused's intent and knowledge that the drugs were in the car.

On appeal, a majority of this Court reversed, and discussed in detail the standards for admission of other acts evidence under 404(b). In doing so, the Court clarified their prior opinion in People v VanderVliet, 444 Mich 52; 508 NW2d 114 (1993), which characterized the rule as one of inclusion rather than exclusion. In Crawford, this Court reaffirmed the rule is one of inclusion, but pointed out that the prosecution, as the proponent of the evidence, bears the burden of showing why it is admissible:

> Under this formulation, the prosecution bears the initial burden of establishing relevance of the evidence to prove a fact within one of the exceptions to the general exclusionary rule of MRE 404(b). Where the only relevance is to character or the defendant's propensity to commit the crime, the evidence must be excluded. Where, however, the evidence also tends to prove some fact other than character, admissibility depends upon whether its probative value outweighs its prejudicial effect, taking into account the efficacy of a limiting instruction in cushioning the prejudicial effect of the evidence. 458 Mich at 385.

The Crawford majority went on to hold that the prosecution's burden cannot be met by merely reciting one or more of the grounds stated in the rule for admission. The prosecution must not only articulate the basis for the proposed admission, but must show factually that the evidence supports that basis, rather than merely demonstrate the accused's bad character:

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> "However, a common pitfall in MRE 404(b) cases is the trial courts' tendency to admit the prior misconduct evidence merely because it has been `offered' for one of the rule's enumerated proper purposes. Mechanical recitation of `knowledge, intent, absence of mistake, etc.,' without explaining how the evidence relates to the recited purposes, is insufficient to justify admission under MRE 404(b). If it were, the prosecutor could routinely admit character evidence by simply calling it something else. Relevance is not an inherent characteristic, Huddleston, [Huddleston v United States, 485 US 681; 108 S Ct 1496; 99 L Ed 2d 771 (1988)] 485 US 689, nor are prior bad acts intrinsically relevant to `motive, opportunity, intent, preparation, plan,' etc. Relevance is a relationship between the evidence and a material fact at issue that must be demonstrated by reasonable inferences that make a material fact at issue more probable or less probable than it would be without the evidence. United States v Sampson, 980 F2d 883, 888 (CA 3, 1992). In order to ensure the defendant's right to a fair trial, courts must vigilantly weed out character evidence that is disguised as something else. The logical relationship between the proffered evidence and the ultimate fact sought to be proven must be closely scrutinized." 458 Mich at 387-388.

In Crawford, this Court stated that for evidence to be relevant, it must be shown that it is both material and has probative value. On the facts of the case, the evidence of the prior drug sale was material, but the Court found the probative value of the evidence - to prove intent or knowledge of the presence of the drugs in the car - insufficient to justify the admission of the prior act:

> "If the prosecutor fails to weave a logical thread linking the prior act to the ultimate inference, the evidence must be excluded, notwithstanding its logical relevance to character.
>
> Turning to the present case, the question becomes whether the prosecutor carried its burden of demonstrating that the defendant's prior conviction establishes some intermediate inference, other than the improper inference of character, which in turn is probative of the ultimate issues in this case, the defendant's knowledge of the presence of cocaine and his intent to deliver it. We agree with the defendant that no such intermediate inference has been established.
>
> * * *
>
> However, the factual relationship between the 1988 crime and the charged offense was simply too remote for the jury to draw a permissible intermediate inference of the defendant's mens rea in the present case. The facts of the 1988 drug offense simply do not bear out the prosecutor's contention that the defendant `obviously knew' the drugs were in his dashboard and that he intended to deliver them. The prior conviction only demonstrates that the defendant has been around drugs in the past and, thus, is the kind of person who would knowingly possess and intend to deliver large amounts of cocaine. To the extent that the 1988 conviction is logically relevant to show that the defendant was also a drug dealer in 1992, we believe it does so solely by way of the forbidden intermediate inference of bad character that is specifically prohibited by MRE 404(b). Thus, the defendant's prior conviction was mere character evidence masquerading as evidence of `knowledge' and `intent.' Because MRE 404(b) expressly prohibits the use of prior bad acts to demonstrate a

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> defendant's propensity to form a certain mens rea, we hold that the trial court abused its discretion in admitting evidence of the defendant's prior conviction and reverse and remand the case for a new trial." 458 Mich at 390-392, 396-397. (Footnotes omitted).

The Crawford majority went on to hold that even had they found some probative or logical relevance of the evidence other than to show bad character, they would have found the evidence more prejudicial than probative:

> "Rule 403 does not prohibit prejudicial evidence; only evidence that is unfairly so. **Evidence is unfairly prejudicial when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury**. In the context of prior bad acts, that danger is prevalent. When a juror learns that a defendant has previously committed the same crime as that for which he is on trial, the risk is severe that the juror will use the evidence precisely for the purpose that it may not be considered, that is, as suggesting that the defendant is a bad person, a convicted criminal, and that if he `did it before he probably did it again.' People v Johnson, 27 F3d 1186, 1193 (CA 6, 1994). **Because prior acts evidence carries with it a high risk of confusion and misuse, there is a heightened need for the careful application of the principles set forth in MRE 403.** Id.
>
> Applying the important principles of MRE 403 to the present case, we cannot escape the conclusion that the most powerful, if not the only, inference that the jury was likely to make from the prior conviction is the forbidden one: that because the defendant was convicted of selling cocaine in 1988, he must be guilty here. Thus, the specter of impermissible character evidence is likely to have significantly overshadowed any legitimate probative value. To use Justice Cardozo's expression, we believe the `reverberating clang' of the evidence that the defendant sold drugs in 1988 drowned the `weaker sound' of the other evidence properly before the jury, leaving the jury to hear only the inference that if the defendant did it before, he probably did it again. Shepard v United States, 290 US 96, 104; 54 S Ct 22; 78 L Ed 196 (1933); United States v Merriweather, 78 F3d 1070, 1077 (CA 6, 1996)." 458 Mich at 398-399. (Footnote omitted). (Emphasis added).

Application of the principles expressed in Crawford, should lead this Court to find the admission of the 'other acts" evidence in this case was an abuse of discretion. A review of the record shows it was "character evidence that is disguised as something else." As with the evidence in Crawford, the "other acts" evidence here failed to meet the test that its asserted probative force supported the claimed grounds for admission under 404(b). Instead, as in Crawford, it was probative only of Appellee's alleged bad character and propensity. The strong possibility existed that the jury, despite the limiting instruction, viewed this evidence as showing that he had a history of engaging in sexually oriented behavior, and concluded that "if he did it once, he must have done it again."

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Even if this Court finds that the prosecution met its burden of showing that the evidence of the prior act was legally and logically relevant to Appellee's motive or intent in the charged offenses, the Court should find that its admission was more prejudicial than probative under MRE 403. The prosecution's theory was that Appellant kidnapped Machus to rape her, but presented absolutely no evidence that any criminal sexual conduct occurred. The allegation that Appellee had sexually harassed several store employees and customers was so inherently inflammatory and disturbing to a juror that its introduction may have tainted the jury's ability to rationally and fairly consider the strength of the prosecution's evidence concerning the charged offenses. The fact that he was convicted of a crime which required him to register as a sex offender and the fact that he was imprisoned for that offense, in the context of this case, substantially prejudiced the jury's decision on whether Appellee was guilty of first degree murder, armed robbery and firearms offenses charged.

This Court should agree with the Court of Appeals that the trial judge reversible erred in permitting the prosecution, over objection, to admit the evidence of the prior "other acts" under MRE 404(b). Accordingly, this Court should deny Plaintiff-Appellant's Application for leave to Appeal or, in the alternative, affirm the decision of the Michigan Court of Appeals vacating Appellee's convictions and remanding his cause to the Wayne Circuit Court for a new trial.

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ARGUMENT II

THE TRIAL COURT'S ERROR IN ADMITTING "OTHER ACTS" EVIDENCE WAS NOT HARMLESS.

Michigan's harmless error statute, MCL 769.26, states that "no judgment or verdict shall be set aside or reversed or a new trial be granted ... unless in the opinion of the court, after an examination of the entire cause, it shall affirmatively appear that the error complained of has resulted in a miscarriage of justice." "Miscarriage of justice" means "prejudice," and "prejudice" means that the error influenced the verdict. People v Mateo, 453 Mich 203, 215; 551 NW2d 891 (1996). The violation of Appellee's constitutional right to a fair trial was not harmless because it resulted in material prejudice, and could have reasonably influenced the jury's verdict.

In People v Anderson (After Remand), 446 Mich 392, 405; 521 NW2d 538 (1994), this Court adopted the same test for preserved constitutional trial error that the United States Supreme Court announced in Chapman v California, 386 US 18; 87 S Ct 824; 17 L Ed 2d 705 (1967). Under that test, error is assessed "in the context of the other evidence presented," and the beneficiary of the error is required to prove that there is no "reasonable possibility that the error complained of might have contributed to the verdict." Id. at 23. The United States Supreme Court held in Chambers v Mississippi, 410 US 284, 302-303; 93 S Ct 1038; 35 L Ed 2d 297 (1973), that trial errors cannot be permitted to "defeat the ends of justice" or otherwise deprive a defendant of his right to a fair trial.

These violations of MRE 404(b) were not harmless and require reversal. Here, the 404(b) evidence was used as a pattern throughout the trial of painting Appellee as a bad person and a sexual predator rather than trying to prove that he committed the specific homicide, robbery, imprisonment and forearms crimes with which he was charged. The purposes for which the prosecutor introduced the other acts evidence had no justification. Instead, these explanations were pretenses for admitting evidence that would allow the prosecution to argue that Appellee had a propensity for crime and that he is a convicted sex offender who was imprisoned. The prosecution cannot possibly meet its burden of establishing that this preserved constitutional error was harmless beyond a reasonable doubt as would be required to uphold the convictions. People v Anderson (After Remand), supra; People v

Carines, 460 Mich 750, 774; 597 N.W. 2d 130 (1999); People v McPherson, 263 Mich App 124, 131; 687 NW2d 370 (2004); Chapman v California, supra.

This Court has often found admission of such bad acts was not harmless error. See Crawford, supra, 458 Mich at 400; People v Major, 407 Mich 394, 401; 285 NW2d 660 (1979). See Also People v Drake, 142 Mich App 357, 360; 370 NW2d 355 (1985) (not harmless to admit bad acts evidence when it had nothing to do with the case against the defendant except to suggest he was a "bad man"). Accordingly, this Court should deny Plaintiff-Appellant's Application for leave to Appeal or, in the alternative, affirm the decision of the Michigan Court of Appeals vacating Appellee's convictions and remanding his cause to the Wayne Circuit Court for a new trial.

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ARGUMENT III

THE TESTIMONY OF THREE POLICE OFFICERS INVADED THE PROVINCE OF THE JURY WHEN THEY TESTIFIED AS TO THEIR OBSERVATIONS IN VIEWING VIDEO EVIDENCE.

Lay witnesses often provide opinions and inferences about a wide range of issues. Sometimes they include information that – while not immediately relevant – helps the jury follow their story. Other times, they simply tell what they saw or heard. That is to be expected. What a witness may not do, however, is tell the jury how other pieces of evidence, not within the scope of the witness's own testimony, demonstrates that the defendant is guilty. Indeed, it is a well-established rule that a witness cannot express an opinion on the defendant's guilt. People v Bragdon, 142 Mich App 197, 199; 369 NW2d 208 (1985) ("[I]t is clear that a witness cannot express an opinion on the defendant's guilt or innocence of the charged offense."). When a witness tells the jury that a video shows the defendant committing a crime – especially where the jury is equally well situated to the witness to see what is on the video – it invades the province of the jury. See People v. Drossart, 99 Mich App 66, 79-81; 297 NW2d 863 (1980).

"If the witness does not testify as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences that are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based in scientific, technical, or other specialized knowledge within the scope of rule 701." MRE 701. Under MRE 602, a witness may only testify to a matter if there is a sufficient showing in support of a finding that the witness has personal knowledge of the matter. Here, the officers had no personal knowledge of the matter, as they were not witnesses to any events during the offenses. Their opinions were based only on their perception of the video, not a perception of the actual events, and were not helpful to either explain their own testimony or necessary for the jury to reach their decision. See People v Beckley, 434 Mich 691, 711; 456 NW2d 391 (1990).

Here, the jurors heard the testimony of witnesses who were familiar with Appellee, and were perfectly capable of coming to their own conclusions, without the testimony of Dearborn Police

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Sergeant Thomas Lance, who stated that the person in other video he reviewed *appeared* to be Appellee, (November 11, 2014 trial transcript at pages 126-133); Dearborn Police Corporal Benjamin Harless, who testified that the person entering the Family Dollar store July 15, 2013 was in fact Appellee, (November 12, 2014 trial transcript at pages 162-163), and Dearborn Police Corporal James Isaacs who, when asked to compare a February 20, 2013 photo on Appellee's computer wearing a jacket with the jacket in the video stated "I believe it to be the same". (November 19, 2014 trial transcript at pages 19-21). Their testimony was not helpful to the jury. They were equally positioned with the jury to determine what exactly the images showed. Their opinion was not based upon any expertise or firsthand knowledge to include Appellee as a participant. Their opinions of what the videos showed and whether they supported a finding that Appellee was guilty of murde invaded the province of the jury. The evidence – the video tape and the still photos – spoke for itself, without the need for interpretation, opinion, or narration by the investigating officers. Opinion testimony, like all other testimony, must have a probative value that is not "substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." MRE 403; Beckley, supra, 434 Mich at 724-725.

Other state and federal courts maintain that such lay-opinion identification testimony is altogether inadmissible because it invades the jury's province. See United States v LaPierre, 998 F.2d 1460 (CA 9, 1993); United States v Rodriguez-Adorno, 695 F3d 32 (CA 1, 2012). As the Court held in LaPierre at 1465, where a police officer identified the defendant in a surveillance video:

> The jury, after all, was able to view the surveillance photos of LaPierre and make an independent determination whether it believed that the individual pictured in the photos was in fact LaPierre. [Officer] Miller's testimony therefore ran the risk of invading the province of the jury and unfairly prejudicing LaPierre.

In People v Harte, 29 AD3d 475, 476; 815 NYS2d 93, 94 (2006), an arson case, the Court held on appeal that the trial court erred in admitting testimony from the store owner's four employees detailing their conclusions, drawn from their observation of a poor-quality surveillance videotape, that the defendant gathered garbage and set the fire in question, especially since none of the employees had actually witnessed the incident. Thus, their opinions "were inadmissible conclusions

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reached by the witness[es] apparently based upon a retrospective view of the events" at the scene.

In Ratliff v State, 879 So 2d 1062, 1066 (Miss Ct App 2004), the Court held that opinion testimony of a store employee and the store manager, describing events depicted in a surveillance videotape of a shoplifting incident that occurred in the store, was not admissible as lay opinion witness testimony in the defendant's shoplifting prosecution, where neither the employee or the manager possessed first–hand knowledge of the defendant's actions on the date the shoplifting incident occurred. The Court said:

> Clearly, neither witness possessed personal knowledge of the event which was recorded on the videotape. Clearly, neither witness would then be positioned under Rule 701 to offer opinion testimony regarding Ratliff's recorded actions. Id.

In Wells v State, 604 So2d 271 (Miss1992), an employee was tried for embezzlement. The employee's actions were recorded on a surveillance tape, and at trial the store owner testified to Wells' actions as the tape played for the jury. The issue was not the witness' testimony, per se, but the witness' commentary on how the actions in the videotape did not comport with store policy. The Mississippi Supreme Court found this to be error because the opinion testimony was not based upon the store owner's first-hand knowledge as required by Mississippi Rule of Evidence 701 due to the fact that the store owner had not personally witnessed Wells' actions on the date in question.

Again, Sergeant Lance, Corporal Harless and Corporal Isaacs did not witness the incident at the Family Dollar store. Their running commentary, consistent with the theory of the prosecutor, was biased and unnecessary. The jury viewed the video and was capable of coming to its own conclusions. The descriptions by Lance, Harless ad Isaacs of what the jurors were able to see for themselves invaded the province of the jury

This testimony was extremely prejudicial. Whether Appellee actually murdered and robbed Orlando and Machus and whether he unlawfully imprisoned Machus was the threshold question in the case. The video was the most important piece of evidence purporting to link Appellee to the crime. The officers should not have told the jury what conclusion to draw from the video. This was a basic, prejudicial error involving the most important piece of evidence in the case. Finally, when

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a prosecutor asks a police officer to draw a conclusion from evidence that the jury is equally well-positioned to evaluate, it impacts the integrity of the judicial system. Indeed, the basic purpose of the jury is to decide questions of fact. When a lay witness, at the behest of the government, tells the jury what conclusion to draw from a video – especially where the video is the most important piece of evidence in the trial – it undermines the credibility of the judiciary. Accordingly, it was plain error for the officers to tell the jury what the video showed.

Alternatively, trial counsel was ineffective for failing to object to these opinions of what the video showed. His failure to do so constituted ineffective assistance. Both the United States and Michigan Constitutions guarantee the right to effective assistance of counsel. US Const, Am VI; Mich Const 1963, art 1, §20. The Supreme Court has recognized that such a right is "needed in order to protect the fundamental right to a fair trial." Strickland v Washington, 466 US 668, 684; 104 S Ct 2052; 80 L Ed 2d 674 (1984). To establish ineffective assistance of counsel, a defendant must show that 1) counsel's performance was deficient and 2) there is a reasonable probability that the deficient performance prejudiced the defense. Id, 466 US at 687-88. This standard requires a lower showing than plain error. People v Fackelman, 489 Mich 515, 537 n 16; 802 NW2d 552 (2011).

While defendants must overcome the presumption that the challenged action might be considered sound trial strategy, a "defendant[] can rebut this presumption by showing that his attorney's performance fell below an objective standard of reasonableness under prevailing professional norms." People v Tommolino, 187 Mich App 14, 17; 466 NW2d 315 (1991); People v Kimble, 470 Mich 305, 314; 684 NW2d 669 (2004). Appellee's defense was (in part) that he was elsewhere on July 15, 2013. (November 20, 2014 trial transcript at pages 153-157, 188-189). No valid defense strategy could involve admitting testimony that the video showed otherwise. The prejudice from this testimony is as outlined above. Whether analyzed as plain error or as ineffective assistance of counsel, the testimony of the three police officers invaded the province of the jury and deprived Appellee of his rights to a fair trial and the effective assistance of counsel. The Court of Appeals reversal must stand and the matter must be remanded for a new trial as ordered.

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RELIEF REQUESTED

WHEREFORE, Defendant-Appellee Lavere Douglas-Lee Bryant prays this Honorable Court deny Plaintiff-Appellant's application for leave to appeal or, in the alternative, affirm the decision of the Michigan Court of Appeals vacating Appellee's convictions and remanding his cause to the Wayne Circuit Court for a new trial.

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Dated: February 6, 2017